

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

No. 3:17-cv-00061

SOUTHERN ENVIRONMENTAL LAW)
CENTER,)
)
Plaintiff,)
)
v.)
)
U.S. ENVIRONMENTAL PROTECTION)
AGENCY,)
)
Defendant.)

**RESPONSE IN OPPOSITION TO
DEFENDANT’S MOTION TO AMEND
THE BRIEFING SCHEDULE**

Now comes Plaintiff the Southern Environmental Law Center (“SELC”) to respond to Defendant the Environmental Protection Agency’s (“EPA”) motion to amend the briefing schedule. EPA’s argument that the briefing schedule should be delayed by months to account for their sluggish production timetable misses the point of SELC’s motion. SELC is asking, as it has been asking for months, for EPA to promptly produce documents responsive to SELC’s Freedom of Information Act (“FOIA”) requests. Additional briefing regarding documents improperly withheld on the basis of FOIA exemptions or improper searching for documents may indeed be necessary after production, but the first step is for EPA to review and produce documents. SELC respectfully requests the Court to DENY Defendant’s motion and to direct Defendant to respond to Plaintiff’s November 16, 2017 Motion for Summary Judgment by February 5, 2018, and to produce documents responsive to SELC’s August 23, 2017 request by March, 31, 2018.

STATEMENT OF FACTS

Regulatory Reform and Diminished Transparency at EPA

On February 24, 2017, President Trump signed Executive Order 13777 (the “Order”). Mem. in Supp. of Mot. for Summ. J., Ex. 1, Dkt. 15-1. The Order requires that federal agencies create a regulatory reform task force and procedures for identifying supposedly “unnecessary” or otherwise burdensome regulations. *Id.* Pursuant to the Order, agencies—including EPA—must “evaluate existing regulations . . . and make recommendations to the agency head regarding their repeal, replacement, or modification.” *Id.* Each agency’s regulatory reform task force must regularly report to the agency head on their progress. *Id.* The Order works hand-in-hand with Executive Order 13771, issued on January 30, 2017, which requires the rescission of two existing regulations for every new one. *Id.* at §2(a)(i). When a regulatory reform task force identifies a regulation as supposedly “unnecessary,” the agency head must prioritize it for elimination. *Id.* at § 3(f).

Since issuing Executive Order 13777, the Trump Administration has moved swiftly to eliminate regulations, particularly environmental protections. In December 2017, the President held a press conference wherein he stated that the administration had “begun the most far-reaching regulatory reform in American history.”¹ He then stated that within the first 11 months in office his administration had “cancelled or delayed over 1,500 planned regulatory actions—more than any previous President by far.”² Weeks later, the President echoed this sentiment, tweeting that “The Trump Administration has terminated more UNNECESSARY Regulation, in just twelve months, than any other Administration has terminated during their full term in

¹ The White House, Remarks by President Trump on Deregulation (Dec. 14, 2017), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-deregulation>.

² *Id.*

office, no matter what the length” and adding “The good news is, THERE IS MUCH MORE TO COME!”³

Despite these broad pronouncements by the President, there has been very little public information on the thinking and reasoning behind the regulatory reform process. And although the President has promised “more to come,” almost nothing has been made public as to what the process will look like going forward.

SELC’s FOIA Requests

To better understand the regulatory reform process, on April 12, 2017, SELC submitted FOIA request EPA-HQ-2017-006074, seeking records in the possession of EPA relating to Executive Order 13777 and its execution and implementation. Compl. Ex. 3, Dkt. 1-4. After some back and forth with agency personnel, EPA extended its own deadline for responding until July 7, 2017, citing as “unusual circumstances” the scope of the request and the time required to respond. Compl. Ex. 8, Dkt. 1-9 (citing 40 C.F.R. § 2.104(d)). Nine months have passed since SELC’s request and no documents have been produced.

On August 23, 2017, SELC submitted a second FOIA request EPA-HQ-2017-010756, seeking any and all records in the possession of EPA relating to the Order and its execution or implementation that were generated or modified after the original request. Mem. in Supp. of Mot. for Summ. J., Ex. 5, Dkt. 15-5. Other than the date range, this request was identical in all respects to SELC’s first request. *Id.* Five months have passed and SELC has yet to receive a single document responsive to this request.

³ Donald J. Trump (@realDonaldTrump), Twitter (Jan. 20, 2018, 4:47 PM), <https://twitter.com/realDonaldTrump/status/954878124214415360>.

Litigation

SELC filed an initial complaint related to the April 22, 2017 request on August 23, 2017. Compl., Dkt. 1. Later, on October 2, 2017, SELC amended its complaint to add additional claims related to the August 23, 2017 request. Am. Compl., Dkt. 10.

A month after amending its complaint, SELC reached out to EPA through counsel. Mot. for Summ. J., Ex. 3, Dkt. 15-3. SELC hoped to resolve this matter without involving this Court, but told EPA it was prepared to file for summary judgment if necessary. *Id.* Three weeks later, EPA had failed to even propose a schedule for producing documents, and abruptly and without explanation canceled a scheduled discussion on the matter, with no timeline for further conversations. *Id.* Accordingly, SELC filed for summary judgment. In its Motion, SELC requested that the Court compel EPA to respond to SELC's two straightforward and time-sensitive FOIAs and to provide the requested documents in an expeditious fashion.

On November 27, 2017 EPA informed SELC that it would not be responding to SELC's Motion for Summary Judgment until February 5, 2018 based on its own interpretation of this Court's November 3, 2017 scheduling order. Exhibit 1. After months of silence, however, EPA did begin discussions about a proposed production schedule for SELC's request. The parties agreed that EPA would produce all documents responsive to SELC's first request by February 15, 2018. Def.'s Mem. in Supp. of Mot. to Am. Briefing Schedule, Ex. 1, Dkt. 22-1. The parties could not, however, reach an agreement on SELC's second request.

SELC requested a status conference on the briefing schedule for this case. Mot. for Status Conference, Dkt. 16. The conference was held on January 8, 2018. Minute Entry, Dkt. 20. Judge Hoppe ordered EPA to file a motion explaining why they thought it was appropriate to

amend the briefing schedule. *Id.* That motion was filed on January 19, 2018 and the Plaintiffs now respond. Mot. to Am. Briefing Schedule, Dkt. 21.

ARGUMENT

I. Defendant's Motion to Amend the Briefing Schedule should be denied because it is based on the flawed premise that this Court can only provide relief in this case once EPA has produced all its documents.

To grant Defendant's motion would undercut the entire case before this Court. EPA's request to extend briefing is in effect a request for the Court to approve a production deadline months later than that sought by SELC in its summary judgment briefing. SELC brought this case because EPA has failed entirely to respond to the April and August 2017 FOIA requests regarding an important matter of national interest. In its request for relief SELC has asked this Court to "Direct EPA to provide all nonexempt, responsive documents to SELC without further delay." Mot. for Summ. J., Dkt. 14. EPA, however, suggests that it will not even entertain briefing on this key threshold issue until it has slowly and belatedly produced the documents requested by SELC.

Months after receiving SELC's requests, EPA has not produced a single document, nor stated that it is withholding documents and the reasons for doing so. This extended silence from EPA constitutes an improper withholding of documents and violates FOIA. *See Citizens for Responsibility & Ethics in Wash. v. Fed. Election Comm'n*, 711 F.3d 180, 188 (D.C. Cir. 2013) This delay led SELC to seek summary judgment and a court-ordered production schedule. FOIA contains deadlines for a reason; productions need to be timely because stale information is not useful. *See ACLU v. Dep't of Def.*, 339 F. Supp. 2d 501, 504 (S.D.N.Y. 2004). The President has been clear that the regulatory reform effort that SELC seeks to better understand is far-reaching and ongoing. SELC requires timely access to the documents it has requested to engage in a meaningful way.

Despite EPA's suggestions to the contrary, courts have a role in ensuring that agencies make prompt determinations on FOIA requests, followed by reasonable production schedules. "[U]nreasonable delays in disclosing non-exempt documents violate the intent and purpose of the FOIA, and the courts have a duty to prevent [such] abuses." *Elec. Privacy Info. Ctr. v. U.S. Dep't of Justice*, 416 F. Supp. 2d 30, 35 (D.D.C. 2006) (quoting *Payne Enters. v. United States*, 837 F.2d 486, 494 (D.C. Cir. 1988)). Accordingly, a court "may use its equitable powers to require the agency to process documents according to a court-imposed timeline." *Clemente v. Fed. Bureau of Investigation*, 71 F. Supp. 3d 262, 269 (D.D.C. 2014).

For example, in *Seavey v. U.S. Dep't of Justice*, 266 F. Supp. 3d 241, 248 (D.D.C. 2017), the U.S. District Court of the District of Columbia rejected the FBI's suggestion that it would produce just 500 pages a month. Instead the court directed the FBI to process 2,850 pages a month. *Id.* The United States District Court for the Southern District of New York recently considered a similar FOIA request sent to EPA in April 2017, like SELC's first request. *Waterkeeper Alliance, Inc. v. EPA*, No. 17-cv-7400 (VEC) (S.D.N.Y.). Transcript of Oral Argument at 2, *Waterkeeper Alliance, Inc. v. U.S. Env't'l Prot. Agency*, No. 17-cv-7400 (VEC) (S.D.N.Y. Nov. 3, 2017, Dkt. 21). EPA estimated that there were approximately 8,000 documents that would be potentially responsive to the request. The court noted that this was "not that many" documents, *id.* at 5, and initially ordered that all electronic production be completed in two months, by the end of 2017, *id.* at 7; Order on FOIA Response, *Waterkeeper Alliance, Inc. v. U.S. Env't'l Prot. Agency*, No. 17-cv-7400 (VEC) (S.D.N.Y. Nov. 3, 2017), Dkt. 18 (extended to Jan. 17, 2018, Dkt. 25). Here, where EPA expects only 4,991 responsive documents, a similar short production schedule should be mandated.

Defendant provides no reason why the Court should not (1) consider summary judgment motions on the threshold issue of whether Defendant has violated FOIA with its undue delay, (2) order timely production by a date certain, and then (3) retain jurisdiction to consider other claims related to the withholding of documents.

II. Defendant's Motion to Amend the Briefing Schedule should be denied because its delayed FOIA response is unreasonable and unsupported.

Defendant proposes an extraordinarily prolonged schedule to respond to SELC's FOIA requests. If EPA has its way, it would not fully respond to SELC's August FOIA request until October 2018—more than 14 months after the request was filed.

Any increase in FOIA requests and litigation directed at EPA is a problem of the agency and administration's own making. Since coming into office President Trump and Administrator Scott Pruitt have attempted to implement unprecedented changes at EPA.⁴ Moreover, the Administration has pursued these actions largely in secret, and has taken a number of steps to decrease transparency at the EPA.⁵ With such extensive changes made outside of the public eye, it is unsurprising that there is significant interest by the public in using FOIA to gain information about the steps the government is taking. EPA cannot use its sweeping overhaul of

⁴ See, e.g., Stephanie Ebbs, Trump EPA spends first year rolling back environmental regulations, ABC NEWS (Jan. 16, 2018, 4:33 AM), <http://abcnews.go.com/Politics/trump-epa-spends-year-rolling-back-environmental-regulations/story?id=52162794>.

⁵ See, e.g., Corbin Hiar, *At Trump's EPA, once-public chemical safety reviews go dark*, SCIENCE (Jan. 10, 2018, 2:15 PM), <http://www.sciencemag.org/news/2018/01/trump-s-epa-once-public-chemical-safety-reviews-go-dark> (EPA no longer posting preliminary assessments of new chemicals); The Denver Post Editorial Board, *EPA fails public in lack of transparency on Superfund changes*, The Denver Post (Dec. 27, 2017, 4:01 PM), <https://www.denverpost.com/2017/12/27/epa-fails-public-in-lack-of-transparency-on-superfund-changes/> (EPA fails to produce records of Superfund task force); Scott Waldman, *Climate Web Pages Erased and Obscured under Trump*, Scientific American (Jan. 10, 2018), <https://www.scientificamerican.com/article/climate-web-pages-erased-and-obscured-under-trump/>; Brady Dennis, *EPA spending almost \$25,000 to install a secure phone booth for Scott Pruitt*, THE WASHINGTON POST (Sept. 26, 2017), https://www.washingtonpost.com/news/energy-environment/wp/2017/09/26/epa-spending-almost-25000-to-install-a-secure-phone-booth-for-scott-pruitt/?utm_term=.f0b64d710eba.

environmental management to excuse its failure to inform the public in a timely manner about the actions it is taking.

Missing from EPA's discussion of its "immense" burden under FOIA is what, if anything, EPA is doing to reduce that burden. One basic step to reduce its FOIA burden would be for EPA to voluntarily make public basic information that, since January 2017, it has provided only under duress. Dozens of requests in 2017, for example, sought the EPA Administrator's schedule,⁶ which EPA finally agreed to make public in September 2017.⁷ EPA could speed FOIA response times for other requesters and relieve the burden of which it complains by shining some light on its basic activities. Other steps could include hiring more staff and redirecting existing staff to the FOIA program. If EPA cannot pursue the activities it wants to pursue in a full legal fashion, including by responding to associated FOIA requests, with the staff it currently has on board, then it must either slow down the pace of its reforms or ask Congress for more funding. Instead, EPA has requested a 30 percent cut to its budget.⁸

Similarly, EPA has failed entirely to provide any reasoned explanation as to why it will take nearly another year to produce documents responsive to SELC's second request. EPA has suggested that it will review 500 documents each month—an extremely low number. But EPA has failed to explain to SELC or to the Court what this number is based on—such as how many employee hours per month it will devote to this request or what its standard review rate is.

⁶ See, e.g., Complaint, *Center for Biological Diversity v. EPA*, 1:17-cv-00816 (D.D.C. May 3, 2017), available at https://www.biologicaldiversity.org/campaigns/open_government/pdfs/ECF_1_Complaint_Pruitt_FOIA_Case_No_17-0816.pdf.

⁷ Emily Atkin, *Scott Pruitt will Finally Release his Public Schedule*, The New Republic, (Sept. 20, 2017), <https://newrepublic.com/minutes/144928/>.

⁸ EPA, *FY 2018 EPA Budget in Brief* at 5, 8, <https://www.epa.gov/sites/production/files/2017-05/documents/fy-2018-budget-in-brief.pdf> (last visited Jan. 26, 2018).

Without more justification and consistent explanation EPA's proposed schedule appears to be entirely arbitrary.

EPA suggests that SELC is attempting to "jump the queue" ahead of other FOIA requests. Not so. SELC is simply requesting this Court to ensure that EPA comply with FOIA in this case and respond to SELC's request in a reasonable time—as is the standard for every FOIA request. Moreover, neither SELC nor any other requester should need to seek expedited processing to receive documents within a year of requesting them. SELC's request did not rise to the level of an emergency. 5 U.S.C. § 552(a)(6)(E). Nonetheless, the request is time-sensitive. FOIA requires that EPA and other agencies "promptly" produce documents responsive to any and every FOIA request, not just expedited requests.

III. EPA has not invoked exceptional circumstances.

When a FOIA request is truly burdensome on an agency FOIA does provide the opportunity for agencies to gain an additional stay for "exceptional circumstances." 5 U.S.C. § 552(a)(6)(C)(i). EPA has not, however, invoked exceptional circumstances in this case, or made any showing that exceptional circumstances apply. Nor could it. The FOIA statute is clear that the term "exceptional circumstances" does not include a delay that results from a predictable agency workload of requests under this section, unless the agency demonstrates reasonable progress in reducing its backlog of pending requests. Here, EPA has made no showing that it is making any attempt to reduce its backlog of requests, still less that it is demonstrating reasonable progress in meeting such a goal.

CONCLUSION

For the foregoing reasons Plaintiff SELC respectfully requests this Court to DENY Defendant's motion to amend the briefing schedule and direct Defendants to respond to Plaintiff's November 16, 2017 Motion for Summary Judgment by February 5, 2018, and to produce documents responsive to SELC's August 23, 2017 request by March 31, 2018.

Respectfully submitted, this 26th day of January, 2018.

/s/ Greg Buppert

Greg Buppert
VA Bar No. 86676

/s/ Kimberley Hunter

Kimberley Hunter
NC Bar No. 41333 (*pro hac vice*)

/s/ Leslie Griffith

Leslie Griffith
NC Bar No. 50122 (*pro hac vice*)

SOUTHERN ENVIRONMENTAL LAW CENTER
201 West Main Street, Suite 14
Charlottesville, VA 22902-5065
Telephone: (434) 977-4090
Facsimile: (434) 977-1483
gbuppert@selcva.org

601 West Rosemary Street, Suite 220
Chapel Hill, NC 27516-2356
Telephone: (919) 967-1450
Facsimile: (919) 929-9421
khunter@selcnc.org
lgriffith@selcnc.org
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of January, 2018, I have served the foregoing Response in Opposition to Defendant's Motion to Amend the Briefing Schedule on the party listed below by electronically filing it with the Clerk of Court on this date using the CM/ECF system, which will send notification of such filing to, and pursuant to Local Civil Rule 7(g)(3) shall constitute service upon, the following:

Sara Bugbee Winn
United States Attorney's Office
310 First Street, S.W. Room 906
Roanoke, VA 24008
Telephone: (540) 857-2254
Facsimile: (540) 857-2283
sara.winn@usdoj.gov
Attorney for Defendant

/s/ Kimberley Hunter
Kimberley Hunter
Attorney for Plaintiff
Southern Environmental Law Center